Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	GC Docket No. 92-52
Reexamination of the Policy	)	RM-7739
Statement on Comparative	)	RM-7740
Broadcast Hearings	)	RM-7741
	)	

TO: The Commission

Comments of the National Association of Broadcasters on the Further Notice of Proposed Rulemaking

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Table of Contents

Page

Summary

The National Association of Broadcasters ("NAB") submits these comments on the Commission's *Further Notice of Proposed Rulemaking*. The *Further Notice* asks for comment on whether (1) the Commission should adopt a mandatory three-year holding period for all new licenses granted in a comparative proceeding, and (2) the Commission should commence another proceeding to consider whether a three-year holding period should be required of the licensees of all stations. NAB opposes both proposals.

As NAB previously argued, the Commission should not be making *ad hoc* changes in its comparative criteria, but instead should undertake to develop new and comprehensive comparative standards, both for comparative initial proceedings and for determining contested renewal applications.

A mandatory three-year holding period for new licenses would not improve the Commission's comparative criteria. The voluntary service continuity preference the Commission previously proposed would, because it would move the Commission away from sterile, manipulable structural standards, and towards conduct standards which will better predict which applicant could best serve the public interest.

The two reasons identified for imposing a mandatory holding period do not support the Commission's proposal. The integrity of the selection process and the discouragement of insincere applicants would be better accomplished through a comparative preference for applicants undertaking a voluntary service commitment.

There is also no reason for the Commission to reconsider its 1982 decision to repeal its anti-trafficking rule. Neither of the reasons which the Commission suggest might support a mandatory holding period for licensees of new facilities apply to assignees of licenses who are not selected by a comparative process. Further, there is no suggestion by the Commission of any changes in circumstances which would support reintroduction

of the old rule. Indeed, many of the factors identified by the Commission as supporting repeal of the rule have strengthened in the intervening years.

The Commission's experience with its old rule — which was waived in every instance in which it would have applied — offers no support for its reintroduction. The only effect the old rule appears to have had was to delay and increase the cost of legitimate transfers of broadcast stations.

Finally, the Commission's decision to permit the formation of larger radio ownership groups in order to increase efficiency and improve service to the public would be threatened if a new three-year rule were adopted. The formation of new and larger broadcast groups often occurs through trades of stations or mergers, which may result in at least technical changes in ownership of a particular station several times within a short period. The Commission should not take an action which will frustrate the formation of the new licensee groups it found would advance the public interest.

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TO: The Commission

Comments of the National Association of Broadcasters on the Further Notice of Proposed Rulemaking

The National Association of Broadcasters ("NAB")[1] submits these comments on the *Further Notice of Proposed Rulemaking* in the above-referenced proceeding, released August 12, 1993. The Commission proposes to make a single change to its comparative selection criteria, mandating a three-year holding period for all licensees selected through comparative proceedings, and further requests comment on whether a proceeding should begin to mandate a similar holding period for all stations, new and old, no matter how acquired. For the reasons that follow, NAB opposes the imposition of any mandatory holding period.

Before turning to the issues raised in the *Further Notice*, however, we note with regret that the Commission's attention is still focused only on changes in the selection criteria for initial licensing. As we argued in our comments in response to the initial *Notice*

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1 NAB is a nonprofit, incorporated association of radio and television stations and networks which serves and represents the American broadcast industry.

in this proceeding, the Commission should first reach a decision in its long-pending inquiry into the appropriate standards for comparative renewal proceedings. *See* Comments of the National Association of Broadcasters, GC Docket No. 92-52 (filed June 2, 1992) at 2-5. NAB pointed out there that the criteria for comparative selection among initial applicants have been largely applied to renewal proceedings without any informed decision that those criteria were appropriate for renewal cases. The Commission recognized in the original *Notice* that any standards it adopts in this proceeding will *de facto* be applied in renewal cases as well, unless it adopts separate renewal standards. Indeed, the Commission's request for comment on extending a mandatory holding period to all stations (*Further Notice* ¶ 10 n. 5) demonstrates this tendency.

Rather than making *ad hoc* changes to its comparative selection criteria that will be uncritically applied outside the context in which they are adopted, the Commission should decide in comprehensive proceedings what criteria are appropriate both for selection of new licensees and for considering renewal applications. This would lead to far greater certainty, both for applicants and the Commission, than would an effort to "patch" the current system of preferences that appear to have little continuing relevance to operation of a station in the public interest. *See Kansas City TV 62 Limited Partnership v. FCC*, 1993 U.S. App. LEXIS 11433 (D.C. Cir. May 10, 1993); *Flagstaff Broadcasting Foundation v. FCC*, 979 F.2d 1566, 1566-67 (D.C. Cir. 1992); *Bechtel v. FCC*, 957 F.2d 873 (1992); *see also* Comments of NAB at 5-9. Since the Commission, however, has instead proposed one specific change to its existing procedures, we now turn to the merits of that proposal.

The Commission Should Promote Service Continuity Through a Voluntary Preference, Rather Than a Mandatory Requirement

As the Commission notes (*Further Notice* ¶ 8), NAB supported the proposal to award a significant comparative preference to applicants for a new license who would commit to operating the station for at least three years. That proposal represented a use-

ful step towards shifting the Commission's selection standards away from sterile structural criteria which can be manipulated by applicants and moving them towards indicators of a commitment to quality service to the public.

The Commission now proposes to require that all licenses granted in a comparative hearing be held for three years, and would apparently leave the selection criteria for licensees unchanged. The Commission discusses only two reasons for this change. First, it claims that the public interest benefits of the comparative selection process would be enhanced if the public were guaranteed service from the preferred applicant for a longer period of time. *Further Notice* ¶ 10. Second, the Commission suggests that a longer mandatory holding period would discourage insincere applicants since they would be aware that they would not only have to implement their proposals, but also would have to operate under them for at least three years. *Id.*

Notably, the Commission does not even suggest that there has been any problem created by winning applicants transferring control of their new stations in the second and third years after they begin operation, or even that there has been any pattern of such behavior. The Commission cannot impose a new regulation to prevent abuse in the absence of any evidence that such abuse has occurred or has affected the public interest. *See Bowen v. American Hospital Association*, 476 U.S. 610, 643-45 (1986)(agency decisions must be supported by evidence of the factual basis underlying the agency's action).

The Commission also (*Further Notice* ¶ 12) claims that its "long experience with the former three-year rule provides sufficient indication of its efficacy and benefits." Any suggestion that the previous rule had any articulable benefit would be revisionist history at its worst. As the Commission recognized in abolishing the rule, any effects it may have had were as likely to be contrary to the public interest as consistent with it. *Transfer of Broadcast Facilities*, 52 RR 2d 1081 (1982), *recon.*, 99 FCC2d 971 (1985). Further, during the twenty years of the old rule's operation, it was waived in virtually every case in which it would have applied, and the Commission never once held a hearing on the *bona*

fides of a proposed transfer as the trafficking rule contemplated. Whether the existence of the rule had the effect of discouraging some station transfers is impossible to determine, but it is likely that any such impact declined over time as the Commission's propensity to waive the rule upon request became known. Therefore, the Commission cannot in this proceeding claim any basis for requiring a new three-year holding period for any licensees grounded upon its experience with the old three-year rule.

In any event, neither of the proffered rationales supports adoption of a three-year holding period as a precondition for applying for a new broadcast license, and the adoption of a service requirement removes many of the benefits which adopting a service continuity *preference* would have achieved. The first reason specified by the Commission — enhancing the public benefits from the Commission's comparative proceedings — rests on an unstated assumption that the integration and diversification criteria now most used to distinguish winning applicants in fact leads to the selection of the best licensee. The court opinions cited above, as well as other observers,[2] have pointed out, that there is little reason to believe that these criteria continue to bear any significant relationship to the ability and commitment of a particular applicant to provide quality service to the public. Instead, their primary effect appears instead to be the creation of insincere applications with ownership arrangements crafted only to satisfy these structural preferences. Indeed, since many of these proposals are designed in such a way that the parties financing a new station are not identified as those who would control that station if built, they may lead to early changes in ownership as the majority investors take *de jure* control once a station begins operation. Establishing a longer mandatory holding period would not enhance the operation of the comparative selection process, but it almost certainly would increase the number of requests that the Commission waive the holding period.

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2 *E.g.*, Comments of NAB at 5-9.

On the other hand, were a commitment to service continuity viewed as an *independent* factor demonstrating that grant of an application would be in the public interest, as the Commission originally proposed, that would strengthen the Commission's selection criteria by reducing the reliance on outdated structural factors. Applicants who were truly committed to station operations would have also less compulsion to manipulate their applications to meet the other criteria since they could rely on the service continuity preference; and the Commission, in choosing such an applicant, could have greater assurance that the winning applicant's proposal will be implemented. Conversely, adoption of the mandatory three-year commitment will not provide any new comparative criteria and will leave the Commission's selection process in its present unsatisfactory condition.

Further, there is no reason to believe that requiring a three-year commitment will discourage insincere applicants more than would awarding a preference to those who voluntarily accepted such a commitment. The current application process requires applicants to make various types of proposals, and the Commission surely expects applicants to be truthful and sincere in making them. Nonetheless, the fact that the Commission is concerned about ways to discourage thoughtless or dishonest proposals indicates that some applicants do attempt to subvert the Commission's expectations. Applicants who would propose a bogus integration plan; or who would submit applications in which nominal control is vested in a person without other broadcast ownership, despite the fact that the application is financed by a party with extensive station holdings; would probably not be dissuaded by a required commitment to operate the station for three years. Such applicants would no doubt expect that the Commission could be persuaded to waive the holding requirement, or believe at worst that the financial benefits to be obtained from selling the station at the end of three years would justify the additional years of operation.

On the other hand, if a three-year holding period were voluntary, applicants who were not fully committed to operating a station might think carefully before making such a promise. Further, since the applicant would have voluntarily chosen to offer a three-year

assurance of operation, the Commission would be justified in refusing to grant earlier requests to transfer such a license, barring a compelling showing of changed circumstances.

It may be, as some commenters have suggested (*Further Notice* ¶ 9), that a three-year service proffer would become almost universal, particularly if the service continuity preference were substantial. If applicants determined that it would probably not be worthwhile to file an application which would be ineligible for the preference, that would have at least as beneficial impact in discouraging speculative applications as would a required holding period. Therefore, since requiring a three-year commitment would not afford any benefits that would not flow from adoption of a voluntary service continuity preference, and would, unlike the voluntary preference, not improve the overall operation of the Commission's comparative selection process, the Commission should adopt the voluntary preference it first proposed.

The Commission also asks for comment on the length of a mandatory holding period, if it decides to adopt one. *Further Notice* ¶ 12. It would be inappropriate to require a licensee, even a new licensee, to hold a station without any ownership change for more than three years. Three years of operation after construction of a new station should be more than sufficient to allay any doubts of an applicant's sincerity. Moreover, a longer holding period — such as the initial license term — would unduly restrict licensees' abilities to operate the stations. If a station proved less successful than the applicant originally anticipated, a rule which prevented changes in ownership could prevent the licensee from obtaining new financing which might only be available by transfer of an equity ownership in the station. Either the quality of service would suffer because of the station's lack of capital, or worse the station would go dark, thus wasting most of the Commission's efforts in determining which applicant could best serve the public. If, on the other hand, the licensee were very successful and wished to purchase a larger station or a station in a different market in place of the station that it built, a long holding period could prevent the

public from obtaining the benefit of efficient operators who would be precluded from taking their experience to another station.[3]

There is No Basis for the Reimposition of a General Anti-Trafficking Rule

In addition to the holding period it proposes for licensees of new facilities, the Commission asks whether it should commence a proceeding to reimpose a holding period on all stations, no matter how acquired. *Further Notice* ¶ 10 n. 5. Whatever the Commission determines with respect to a holding requirement for new facilities, there is absolutely no basis for the Commission to reinstitute its outdated anti-trafficking rules.

To begin with, neither of the two rationales put forth for a holding period for licensees of new facilities applies to stations which are obtained by purchase or transfer. Since the reversal of the *Avco* doctrine in the 1951 amendments to the Communications Act, the Commission has not been permitted to engage in comparative consideration of proposed transferees of licenses with other potential transferees. *MG-TV Broadcasting Co. v. FCC*, 408 F.2d 1257, 1264 (D.C. Cir. 1968)("[W]here permission is sought to assign a valid existing permit, the only question is whether the proposed assignee possesses the minimum qualifications consistent with the 'public interest, convenience and necessity.'") Thus, there is no comparative selection process of which the public must be

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[3] In Paragraph 14 of the *Further Notice*, the Commission requests comments on whether the imposition of a longer holding period should lead to a requirement for additional reports from new licensees about their compliance with the proposals contained in their applications. Were the Commission to adopt a mandatory holding period, NAB recognizes that the need for some means of ensuring compliance with the commitments made by the applicant logically follows. The burden which regular reports would impose both on licensees and the Commission's staff who would have to review the reports is yet another reason why the Commission should not adopt the proposed holding period. As an alternative, the Commission could require reports on licensees' effectuation of the proposals in their applications only when an application is filed to transfer a license during the first three years after a new station begins operation.

reassured about its integrity. Indeed, since the Commission does not choose transferees, but only determines that they meet minimum public interest qualifications, requiring those licensees to hold a station for a minimum period could harm the public by extending the time a poorly qualified licensee operates a station.

Also, there is no need for a holding period to ensure that licensees who obtain stations through transfers fulfill commitments they made to the Commission. Few if any elaborate proposals are required of proposed transferees by the Commission, and since there is no comparative consideration of those proposals, there is no incentive to proffer insincere or foolish plans as part of a transfer application. If a transferee does not operate its station in the public interest, the Commission will have an ample opportunity to take appropriate action either at renewal time or when the licensee proposes to transfer the station again.

Thus, even if the factors suggested by the Commission as supporting a required holding period for new facilities supported the adoption of such a policy — which they do not — they have no application to the very different situation of the acquisition by transfer of the license of an existing station. Nor are there any other reasons for the Commission now to reverse what the Court of Appeals described as its "well-articulated conclusion that continuation of the [three-year holding] rule would lead to more deterioration in service than would its elimination." *Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 813, 817 (D.C. Cir. 1990); *see Transfer of Broadcast Facilities*, 52 RR 2d 1081 (1982), *recon.*, 99 FCC2d 971 (1985).

The Commission then found that over-the-air broadcasters operated in an environment characterized by increasing competition, noting that cable penetration had reached 30 percent. 52 RR 2d at 1086-87. Since 1982, the number of television stations

has increased steadily and cable penetration now exceeds 65 percent.[4] The Commission also noted that the anti-trafficking policy had been instituted in an effort to hold down station prices to ease entry into the market. *Id.* at 1087. While prices for broadcast stations did go up in the 1980's, they subsequently declined significantly, demonstrating that the presence or absence of the anti-trafficking rule had no appreciable impact upon station prices.

The Commission also found that there was no necessary correlation between the operation of a station with the intent of increasing its value for resale and operation that is not in the public interest. *Id.* at 1088. There is no suggestion in the *Further Notice* of any evidence that the Commission's expectations in this regard have not been met. Indeed, the Commission subsequently reaffirmed its conclusions in declining to reinstitute a mandatory holding period in the ruling at issue in *United Church of Christ*. Although the Commission may change its views about the regulations which the public interest requires, it cannot do so without either identification of the circumstances which have changed since its earlier decision or an explanation of the changes in its perception of the public interest. *See, e.g., Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Absent such evidence that the public interest is being disserved by excessive trafficking in broadcast stations — and NAB is aware of nothing that would support such a conclusion — the Commission could not reimpose a holding period for existing facilities.

Moreover, the Commission's experience with the previous anti-trafficking rule offers no support for its reintroduction. In every instance in which the rule would have applied, the Commission waived it. Thus, the Commission never was presented with a transfer which it believed was the product of prohibited "trafficking." Instead, it

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4 *Warren's Cable Regulation Monitor*, Sept. 27, 1973, at 9 (reporting Arbitron estimate of total cable subscribers).

concluded that each proposed transfer was the product of a legitimate business decision which did not raise any of the concerns underlying the three-year rule. This experience is instructive in two ways: First, the absence of questionable transactions in the 20 years in which the three-year rule was in operation offers further, and compelling, evidence that the public interest is not harmed by permitting the free transfer of existing broadcast facilities. Second, since the only apparent effect of the Commission's prior rule was to increase the cost of transfers by requiring the filing of extensive waiver requests, thus also further burdening the Commission by the necessity of reviewing these requests, the Commission would be under a heavy burden to demonstrate why a new rule would have any different effect. Increasing the revenues of broadcast counsel has not generally been considered to be within the Commission's mandate.

Further, reimposing a holding period would frustrate the achievement of other public interest goals of the Commission. In *Revision of Radio Rules and Policies*, 7 FCC Rcd. 2755, 2760-61, *recon.*, 7 FCC Rcd. 6387 (1992), the Commission found that

> "[I]t is time to allow the radio industry to adapt to the information marketplace of the 1990s, free of artificial constraints that prevent valuable efficiencies from being realized. Relaxing our radio ownership restrictions will grant operators greater opportunity to combine administrative, sales, programming, promotion, production and other functions. . . Not only will such efficiencies enable radio stations to improve their competitive standing; they may also play a significant part in improving the diversity of programming available to the public."

The Commission accordingly revised its rules to permit the formation of new and larger groups owning radio stations. While in some instances, these groups may be formed by combining existing groups, or by a series of purchases made by well-financed operators, the history of many existing groups indicates that they were built by operators who acquired stations in small or medium markets, increased the value of those stations by

improving their programming and the efficiency of their operation, and then sold those stations and used the proceeds to acquire stations in larger markets.

Even where stations are not sold, many groups may determine that the most attractive means of financing growth is through mergers with smaller groups. Since a merger may result in at least a formal change in ownership for every station in both groups, each stage in building a new group might involve at least a technical violation of a new three-year holding rule. Further, since the Commission relaxed its duopoly rules, owners may determine that the greatest efficiency lies in focusing their operations in a limited number of markets where they can develop a substantial market presence. To do so, they may have to sell stations in other markets. Again, the transactions which may lead to the formation of these more efficient radio organizations will almost inevitably include applications for transfer of licenses which have been held for less the three years.

All of these transactions would presumably be in the public interest since they advance the Commission's goal of increased efficiency. A new three-year holding period, however, would prevent, or at least delay, many of these transactions. The Commission should not begin a proceeding leading to rules which would impede the ability of broadcasters to meet the increased competitive challenges they now face.

Conclusion

For the foregoing reasons, the Commission should not adopt the mandatory three-year holding period for new licenses proposed in the *Further Notice*. It also should not begin a proceeding looking towards reimposition of its failed anti-trafficking rule.

Respectfully submitted,

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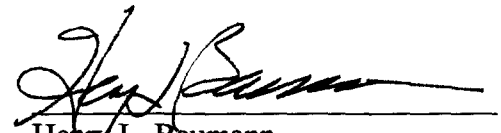

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